

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, :
Plaintiff, :
- against- : 07-Civ-8385 (GEL) (HP)
MORRIS GAD AND NATHAN ROSENBLATT, :
Defendants. :

X

**RESPONSE OF PLAINTIFF SECURITIES AND EXCHANGE COMMISSION
TO MOTION OF JORA DAVIDOV AND BORIS DAVIDOV
TO INTERVENE AND FOR PROTECTIVE ORDER**

SECURITIES AND EXCHANGE
COMMISSION
New York Regional Office
3 World Financial Center – Room 400
New York, New York 10281-1022
(212) 336-0175
Valerie A. Szczepanik
Audry Weintrob

Preliminary Statement

Pursuant to the Court's Order dated March 25, 2008, Plaintiff Securities and Exchange Commission ("Commission") hereby files its Response to the Motion of Jora Davidov and Boris Davidov ("the Davidovs") to Intervene and For Protective Order.

Background

The Commission commenced this civil enforcement action on September 27, 2007, charging defendants with illegal insider trading in the securities of NBTY, Inc. ("NBTY"), a distributor of nutritional supplements. (Dkt. #1.) In its Complaint, the Commission alleges that, in July 2004, Nathan Rosenblatt ("Rosenblatt"), a director of NBTY and member of its audit committee, tipped his close friend Morris Gad ("Gad") with inside information about the company's significant revenue and earnings shortfall for its third quarter of 2004, prior to the public release of that information. (Id.) With that information in hand, Gad traded NBTY securities, netting trading profits and avoiding losses of approximately \$400,000. (Id. at ¶ 6.)

By motion dated October 15, 2007, defendants moved to dismiss the Complaint. (Dkt. # 4.) By Opinion and Order dated December 17, 2007, the Court denied the motion to dismiss. (Dkt. # 14.) On January 15, 2008, the Court entered a final judgment by consent as to Gad. (Dkt. # 18.) Discovery commenced and is ongoing.

On March 10, 2008, Plaintiff was served with a document request pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure. (Declaration of Audry Weintrob ("Weintrob Decl.") ¶ 8 & Ex. B.) The document request called for, among other things, "All documents related to the underlying investigation of this action . . ." (Id.) Responsive to that request are, among other things, documents relating to the Davidovs that were lawfully obtained by the Commission during its investigation. (Id. ¶¶ 4-7 & Ex. A.) In connection with its production of

documents to Rosenblatt, counsel for the Commission proposed a Confidentiality Stipulation and Protective Order (“Protective Order”) covering non-public financial information, including bank and brokerage account statements, of individuals other than Rosenblatt. (Dkt. # 21.) The Commission and Rosenblatt executed the Protective Order and, on March 25, 2008, the Court entered the Protective Order. (*Id.*)

On March 25, 2008, the Commission was served with the instant Motion (Weintrob Decl. ¶ 14.) On March 25, 2008, the Court ordered Plaintiff to file any response on or before April 1, 2008, and to not produce any of the Davidovs’ documents until the pending Motion is decided. (Dkt. # 20.) Although the Commission has not produced any of the Davidovs’ documents to Rosenblatt since the instant Motion was served, the Commission produced a limited set of Davidov documents *prior* to the Motion which are subject to the Protective Order. (Weintrob Decl. ¶ 9.)

Response

The Commission does not object to the Davidovs’ Motion to Intervene for the limited purpose of seeking a protective order pursuant to Rule 26(c). By this Motion, the Davidovs seek to prevent the production of documents related to them.

Absent Court order, the Commission sees no basis for it to withhold production of the requested documents. At this unfinished stage of discovery, the Commission cannot comment on the relevance of the documents to its case against Rosenblatt except to say that, given the Davidovs’ association to, and trading consistent with, Gad, the documents conceivably could relate to another instance of tipping by Rosenblatt to Gad. (See Weintrob Decl. Ex. A.)

There is a Protective Order in place governing the use by Rosenblatt of the Davidov documents and confining that use to this litigation. See SEC v. TheStreet.com, 273 F.3d 222,

229 (2d Cir. 2001) (protective orders serve "the vital function . . . of 'securing the just, speedy, and inexpensive determination' of civil disputes . . . by encouraging full disclosure of all evidence that might conceivably be relevant. This objective represents the cornerstone of our administration of civil justice.") (citations omitted). This Protective Order affords a measure of protection to the Davidovs regarding the disclosure of documents relating to them. However, should the Court determine that a more stringent Protective Order is warranted, it is well within the Court's discretion to modify the Protective Order currently in place. Id. at 231 (whether to modify a protective order is decision committed to the sound discretion of the trial court) (quotation and citations omitted).

Dated: March 31, 2008
New York, New York

Respectfully submitted,



VALERIE A. SZCZEPANIK
AUDRY WEINTROB
Attorneys for Plaintiff
Securities and Exchange Commission
New York Regional Office
3 World Financial Center
New York, NY 10281-1022
Ph: (212) 336-0175
Fax: (212) 336-1317
Email: szczepanikv@sec.gov
weintroba@sec.gov

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Response of Plaintiff Securities and Exchange Commission to Motion of Jora Davidov and Boris Davidov to Intervene and For Protective Order by transmitting a copy of same via overnight mail prepaid on this 31 day of March, 2008 to:

Thomas Fitzpatrick, Esq.
500 Fifth Avenue, 33rd Floor
New York, NY 10110-3398

Sheldon Eisenberger, Esq.
The Law Office of Sheldon Eisenberger
30 Broad Street, 27th Floor
New York, NY 10004

Audry Weintrob
AUDRY WEINTROB, ESQ.
Attorney for Plaintiff
Securities and Exchange Commission
New York Regional Office
3 World Financial Center
New York, NY 10281-1022
(212) 336-0184